

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 13, 2008

CHARLES C. DICK v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Maury County
No. 13702 Jim T. Hamilton, Judge**

No. M2007-00542-CCA-R3-PC - Filed September 19, 2008

The petitioner, Charles C. Dick, entered a best interest plea to second degree murder in exchange for a sentence of twenty-three years. The petitioner now appeals the post-conviction court's denial of his request for post-conviction relief and contends that: (1) the "clear and convincing" evidence standard set forth by Tennessee statute imposes an unconstitutional burden on the petitioner; (2) he received the ineffective assistance of counsel; and (3) his guilty plea was unknowing and involuntary. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Hershell D. Koger, Pulaski, Tennessee, for the appellant, Charles C. Dick.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and Lawrence R. Nickell, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On August 19, 2004, the petitioner entered a best interest plea to second degree murder in exchange for a sentence of twenty-three years in confinement. In doing so, the petitioner acknowledged that several witnesses saw him and the victim, Clayton Norwood, at a bar prior to the victim's death. The petitioner also acknowledged that after he and the victim left the bar he got into an altercation with the victim and hit him. His punches drew blood and he left the victim on the side of the road. The petitioner also acknowledged that the state found some of the victim's blood in his vehicle. The petitioner claimed that the blood was from the fight and nothing more. No direct appeal was taken. Subsequently, the petitioner filed a timely petition for post-conviction relief. Thereafter, post-conviction counsel was appointed and an evidentiary hearing was held.

At the hearing, the petitioner testified that he was indicted for the first degree murder of the victim and the Public Defender's Office was appointed to represent him. However, after about eight months of representation, the attorney from the Public Defender's Office withdrew after discovering a possible conflict of interest. At this time, the trial court appointed two attorneys (hereinafter referred to as counsel and co-counsel). The petitioner recalled that both attorneys represented him for about thirteen months before he pled guilty to second degree murder. He also recalled that his attorneys visited him about twenty times in jail. The petitioner claimed he was prejudiced by the early conflict of interest because he "repeatedly asked for a bond reduction hearing" and did not get one.

The petitioner testified that his attorneys told him that they had hired Ken Lord, a private investigator, to help with the case. The petitioner noted that Investigator Lord had made a progress report on August 10, 2004, nine days before he pled guilty. However, the petitioner asserted that his attorneys failed to discuss this particular progress report with him. The report was entered into evidence and states in relevant part:

On August 10, 2004, Reporting Investigator (RI) interviewed Sandra Jones Norwood at her residence

[Mrs.] Norwood appeared visibly upset during most of the interview

[Mrs.] Norwood stated she was initially told of her estranged husband's death by police who had come to interview a Patricia Buchanan. [Mrs.] Norwood stated the day and night prior to her husband's death she was with her current live-in boyfriend whom she identified as James Hull. [Mrs.] Norwood stated neither she nor Hull had anything to do with her husband's death. [Mrs.] Norwood also stated that police had never interviewed her regarding her husband's death.

[Mrs.] Norwood was asked . . . who might have had a motive to do the amount of physical damage done to Clayton Norwood other than Charles Dick. [Mrs. Norwood] immediately named Frank Buchanan. [Mrs.] Norwood stated there had been bad blood for years between Clayton Norwood and Frank Buchanan due to a relationship [Buchanan] had with [Clayton's] mother and unwanted attention toward herself by [Buchanan]. [Mrs.] Norwood stated that a David McClain (sp) had been killed in the Summertown area several years prior and she suspected Frank Buchanan had a part in that murder. [Mrs.] Norwood stated Frank Buchanan had committed suicide earlier in the year.

The petitioner testified that his attorneys discussed the tire tread evidence with him. He recounted that the tire tread evidence showed that the tire treads found at the crime scene were consistent with the tires on his car. The petitioner also recalled that his attorneys discussed a second investigative report regarding some background information on a possible state witness, Annette

Rose. However, the petitioner complained that his attorneys failed to inform him that both Annette Rose and her boyfriend owned Ford Festivas. The petitioner claimed that this information was important because these Festivas had the same “12-inch” tires as his car. According to the petitioner, he knew that the Festivas had the same tires as his car because he knew “both cars personally.” The petitioner asserted that he did not learn of this information until he had reviewed all the discovery in the case. He further asserted that after discovering the information regarding Frank Buchanan and Rose’s Ford Festiva, he no longer believed it was in his best interest to enter a guilty plea to second degree murder. Rather, he would have requested further investigation of these matters.

On cross-examination, the petitioner claimed that the Public Defender’s Office had represented the victim on a DUI charge sometime prior to the victim’s death. However, the petitioner admitted that the Public Defender’s Office withdrew from his case when the conflict of interest was discovered. The petitioner acknowledged that he was originally indicted on first degree murder and his attorneys worked out a deal with the state wherein he was able to plead guilty to second degree murder and receive a sentence of twenty-three years. The petitioner also acknowledged he had numerous discussions with his attorneys about the case.

The petitioner acknowledged that he told the court he was entering his guilty plea “freely and voluntarily.” However, the petitioner asserted that he “was told that if [he] didn’t say ‘yes sir,’ [his] plea would not be accepted.” As a result, he answered the questions with “yes sir” because he did not want to get “60 years in the penitentiary.”

The petitioner’s trial counsel testified that the petitioner’s case had not been a death penalty case, therefore, the petitioner was not entitled to the assistance of co-counsel or a private investigator. However, counsel determined assistance was needed. Therefore, counsel requested and received the assistance of co-counsel and a private investigator. Counsel recalled that he first learned of Frank Buchanan during an early conversation with the petitioner. The petitioner told counsel that he believed Frank Buchanan was a suspect in the killing of the victim, Clayton Norwood, because Buchanan may have been involved in a relationship with Mrs. Norwood. Counsel further recalled that he investigated the matter and found “no proof of any involvement by a Mr. Frank Buchanan or anybody else.” Counsel explained that he interviewed Buchanan’s wife and the victim’s wife, Mrs. Norwood, and, other than speculation from Mrs. Norwood, no specific information was offered to support the speculation. As a result, counsel did not pursue further investigation into Frank Buchanan. Counsel stated that he talked at length with the petitioner about Mrs. Norwood’s speculation concerning Frank Buchanan. Counsel further stated that he updated the petitioner on the status of the case each and every time he met with the petitioner.

Counsel testified that he and co-counsel went to the crime scene on numerous occasions as part of their investigation. At the scene, he compared photographs from the scene and looked for clues to help the petitioner’s case. Counsel recalled that he met and interviewed at least fifteen witnesses, including Annette Rose. Counsel noted that he discussed Mrs. Rose with the petitioner, including the fact that she owned a car similar to the one driven by the petitioner. However, counsel stated that he never heard of any allegation that Rose had the same tires on her vehicle as the one

driven by the petitioner; and therefore, he did not investigate the matter. Counsel recalled that he interviewed Mrs. Rose, who was going to testify for the state. According to counsel, Mrs. Rose was prepared to testify that on the night of the murder she pulled out of an area within a few hundred yards from where the victim's body was found. She later encountered the petitioner outside a local highway bar. The petitioner was drunk at the time. Mrs. Rose saw blood on the petitioner's car and asked about it, wherein, the petitioner told her that it was blood from a deer. Counsel testified that although he believed Mrs. Rose's story to be a bit strange and inconsistent, he uncovered nothing in the course of his investigation that implicated Mrs. Rose in the victim's death. He recounted, "We didn't have any leads that took us to any motive, or proof that she was involved in any way."

Counsel testified that he did not tell the petitioner to take the plea deal but believed the petitioner took the deal because there "was a mountain of evidence against him." As to the evidence, counsel recalled that the petitioner admitted to police that he was the last person to see the victim alive. The petitioner also admitted he had been in an altercation with the victim the day of the murder. Counsel recounted that a tire tread analysis indicated the last tracks down the dirt path where the victim's body was found were consistent with the tread pattern on the tires of the petitioner's car. Counsel also recalled that a state witness saw a car with the same color as the petitioner's car below a bridge in the area where the victim's body was eventually discovered. Counsel further recalled that the victim's blood was found on the accelerator or brake pedal and seat of the petitioner's car. Counsel also noted that the petitioner washed a part of his car shortly after the victim disappeared and it was this part of the car where Ms. Rose told police she had seen blood. Counsel further noted that three inmates alleged that the petitioner confessed the murder to them. Counsel stated that although the petitioner maintained his innocence, the petitioner admitted he was drunk the night in question and could not remember much of what happened.

Counsel testified that he met with individuals from the District Attorney's Office and the Tennessee Bureau of Investigation many times in attempt to negotiate a plea for the petitioner. However, counsel noted that he did not force the petitioner into the plea. Counsel said that he was prepared to go to trial and made it clear to the petitioner that the decision to accept or reject the plea agreement was his to make. Counsel recalled that when discussing the plea agreement with the petitioner he discussed the evidence against the petitioner and the fact that the petitioner could be facing life imprisonment should the jury find him guilty of first degree murder.

On cross-examination, counsel said that he could not remember if he met with the petitioner to discuss the specific contents of the August 10 report made by Investigator Lord before the petitioner entered his guilty plea. However, counsel asserted that the information contained in the report was not newly discovered and had been previously discussed with the petitioner. Counsel said he believed that he discussed the blood spatter analysis with the petitioner. He also noted that he was prepared to challenge the autopsy on the basis that the reported time of death was "extremely broad." He further noted that he was prepared to challenge the credibility of the medical examiner utilizing the examiner's "licensure issues." However, counsel noted that there was no disputing the cause of death as the autopsy photographs clearly showed that the victim had his throat slit and suffered multiple stab wounds to his body. Counsel recalled that he discussed the petitioner's intoxication

on the night in question many times with the petitioner. He stated that he was prepared to use the petitioner's intoxication as a defense of "diminished capacity" if the case would have gone to trial.

At the conclusion of the hearing, the court dismissed the petition finding that counsel was not ineffective. The petitioner appealed.

ANALYSIS

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

In order to establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Id.* at 694. When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must prove that counsel performed deficiently, and, but for counsel's errors, the petitioner would not have pled guilty but, instead, would have insisted upon going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Should the petitioner fail to establish either element of ineffective assistance of counsel, the petitioner is not entitled to relief. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

On appeal, the petitioner first argues that the "clear and convincing" evidence standard set forth by Tennessee Code Annotated section 40-30-110(f) places an unconstitutional burden on him that is not required under *Strickland v. Washington*. In support of his argument the petitioner relies on *Williams v. Taylor* wherein a plurality of the United States Supreme Court explained the following:

A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052.

Williams, 529 U.S. 362, 405-406 (2000). Relying on this explanation, the petitioner argues that the proper standard of proof for determining the ineffective assistance of counsel at the post-conviction hearing should be "reasonable probability that the result would have been different" and not the more demanding standard of "clear and convincing evidence."

Upon review, we fail to see how this pronouncement set forth in *Williams v. Taylor* conflicts with our statutory requirement that a petitioner prove his factual allegations set forth in his petition by clear and convincing evidence. In our view, Tennessee's Post-Conviction Procedure Act assigns to a petitioner a threshold burden of proving his factual allegations by clear and convincing evidence in order to show entitlement to post-conviction relief. This burden of proof does not supplant or undermine *Strickland's* standard of review for determining ineffective assistance of counsel. In our view, the *Strickland* standard of review incorporates the application of law to the proven facts of the case. In other words, *Strickland* proscribes a standard of review for those proven facts to determine whether counsel's performance was deficient or whether the petitioner was prejudiced by that deficiency. In this respect, the clear and convincing burden of proof set forth in Tennessee's Post-Conviction Procedure Act is not "mutually opposed" to the standard of review set forth in *Strickland*. Furthermore, we note that the Tennessee Supreme Court has upheld and applied this burden of proof in numerous cases, and we are bound by the rulings of that court. *See, e.g., Wallace v. State*, 121 S.W.3d 652, 656 (Tenn. 2003); *Nichols v. State*, 90 S.W.3d 576, 586 (Tenn. 2002). The petitioner is not entitled to relief on this issue.

The petitioner next complains that he received the ineffective assistance of counsel. Specifically, he argues that his counsel was ineffective because: (1) counsel failed to disclose an investigative report dated August 10, 2004; (2) counsel failed to discuss evidence of a witness' car and tires; (3) counsel failed to inform the petitioner of the medical examiner's credibility issues; and (4) counsel failed to inform the petitioner of the intoxication defense for first degree murder.

Upon review, we conclude there is no merit to the petitioner's allegation that he received the ineffective assistance of counsel. At the close of the hearing, the post-conviction court found that the petitioner's attorneys "did all that they could do." We agree. To begin, the record shows that the petitioner was fully apprised of the speculation that Frank Buchanan might be involved in the

victim's death but no proof was ever discovered to support the speculation. Also, the record shows that counsel discussed with the petitioner the fact that Annette Rose drove a vehicle similar to the one the petitioner drove. However, no evidence was ever found that linked Mrs. Rose to the victim's death. In addition, the record shows that counsel was prepared to challenge the credibility of the medical examiner but the fact that the victim died from multiple stab wounds was not in dispute as the autopsy photographs clearly evidenced stab wounds on the victim's body. The record further shows that the petitioner's intoxication on the night of the murder was discussed numerous times, and counsel was prepared to utilize a defense of diminished capacity should the case go to trial. However, the petitioner chose to enter a "best interest" plea in exchange for a sentence of twenty-three years rather than face life imprisonment if convicted of first degree premeditated murder.

Success or perfection is not the standard of measure for counsel's performance; rather, a petitioner is entitled only to constitutionally adequate representation. *See Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). It is apparent from the record that counsel's representation fell within the range of competence demanded of attorneys in criminal cases. *See Baxter*, 523 S.W.2d at 936. Based on the record, the petitioner's attorneys met with the petitioner numerous times to discuss the case; reviewed discovery materials with the petitioner, efficiently utilized investigative services from the court, interviewed numerous witnesses, surveyed the crime scene on more than one occasion, prepared for trial but negotiated a favorable plea agreement, and explained to the petitioner the nature and consequences of the guilty plea. In sum, the petitioner has not proven that his attorneys were deficient in their representation, or that the petitioner would not have pled guilty but for the alleged deficiencies of counsel. Accordingly, the petitioner is not entitled to relief.

The petitioner also complains of ineffective assistance of counsel because his original attorney with the Public Defender's Office discovered a conflict of interest and withdrew from the petitioner's case.

It is unquestioned that "an accused is entitled to zealous representation by an attorney unfettered by a conflicting interest." *State v. Thompson*, 768 S.W.2d 239, 245 (Tenn. 1989). An actual conflict of interest may exist where an attorney is "placed in a position of divided loyalties." *State v. Tate*, 925 S.W.2d 548, 553 (Tenn. Crim. App. 1995); *see also State v. Culbreath*, 30 S.W.3d 309, 315 (Tenn. 2000). "If an attorney actively represents conflicting interests, no analysis of prejudice is necessary; it is presumed that his divided interests adversely affected his representation." *Thompson*, 768 S.W.2d at 245. However, prejudice is presumed only if it is demonstrated that counsel actively represented conflicting interests and that the actual conflict of interest affected the adequacy of counsel's performance. *See State v. Billy Jackson Coffelt*, No. M2005-01723-CCA-DAC-CD, 2006 WL 2310597, *17 (Tenn. Crim. App., at Nashville, Aug. 8, 2006); *see also Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). To establish a claim based upon a conflict of interest, the conflict must be actual and significant, not irrelevant or "merely hypothetical." *Terrance B. Smith v. State*, No. W2004-02366-CCA-R3-PC, 2005 WL 2493475, *5. (Tenn. Crim. App., at Jackson, Mar. 27, 2006).

At the hearing, the petitioner complained that he received the ineffective assistance of counsel because his original attorney from the Public Defender's Office withdrew after discovering a possible conflict of interest. The petitioner recalled that the Public Defender's Office discovered it had represented the victim on a DUI charge sometime in the past and withdrew from the petitioner's case. The petitioner asserted that his case was prejudiced by this conflict because he was unable to get a bond reduction hearing. The petitioner acknowledged that the trial court appointed two new attorneys to represent his case and that both attorneys represented him for about thirteen months before he pled guilty to second degree murder. The post-conviction court found that the petitioner's case was not harmed because the Public Defender's Office immediately withdrew representation upon discovering the possible conflict of interest. As such, the court found no merit to the petitioner's complaint.

Upon review, it is clear that the petitioner failed to establish the existence of an actual and significant conflict of interest. In addition, the petitioner has not demonstrated that the initial representation from the Public Defender's Office's compromised the subsequent representation of the petitioner by counsel and co-counsel. Accordingly, the record does not preponderate against the findings of the post-conviction court, and the issue is entirely without merit.

Finally, the petitioner presents an interrelated claim that he entered an unknowing and involuntary guilty plea because counsel did not advise him of all the proof and possible defenses in his case.

A petitioner may successfully contest a conviction when his or her guilty plea is unknowing or involuntary. *See* Tenn. Code Ann. § 40-30-103; *Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Wilson*, 31 S.W.3d 189, 194 (Tenn. 2002). A plea is not voluntary or knowing if it results from ignorance, misunderstanding, coercion, inducements or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). In addition, a plea is not voluntary if the defendant "is incompetent or otherwise not in control of his mental facilities' at the time the plea is entered." *Id.* (citations omitted). When determining the knowing and voluntary nature of the guilty plea, the court must look to various circumstantial factors including:

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Id. The standard is and remains "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *see also State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). A petitioner's solemn declaration in open court that his or her plea is knowing and voluntary creates a formidable barrier

in any subsequent collateral proceeding because these declarations “carry a strong presumption of verity.” *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

At the post-conviction hearing, the petitioner claimed his plea was unknowing and involuntary because he was told to say “yes, sir” to the trial court’s questions if he “didn’t want 60 years in the penitentiary.” Addressing the petitioner’s claim, the post-conviction court noted the following:

The Best Interest Plea of guilty was done in detail by the court. I went into my usual admonishment in [the petitioner’s] case, in that plea. And then after I finished, [counsel questioned] the [petitioner], even deeper than the court did. . . . And [counsel] went through this plea almost letter by letter.

And [the petitioner] indicated when asked in every respect, that he understood exactly what was going on. And that, he was not forced to [plead guilty]. And that, he and [counsel] had spent a considerable amount of time discussing this case, and felt that it would indeed be in his best interest to take this plea offer of second-degree murder and 23 years.

[Y]ou never know what a jury’s going to do, especially in a case such as this, . . . these terrible wounds and terrible set of facts. [The petitioner] could have very well gotten first-degree murder.

The State didn’t seek the death penalty, but . . . I could see how it could [have] been either a life sentence, or perhaps even a life [sentence] without the possibility of parole.

So, I’m going to dismiss the petition

As noted by the post-conviction court, the record establishes that the petitioner knowingly, intelligently, and voluntarily pled guilty to second degree murder and received a favorable twenty-three year sentence. During the plea, the petitioner informed the court that counsel had thoroughly discussed the facts of the case with him, that he understood the strengths and weaknesses of his case, that he understood his rights not to plead guilty and go to trial, and that he was entering his plea “freely and voluntarily.” Therefore, the petitioner did not carry his burden of demonstrating that his plea was unknowing and involuntary. Accordingly, the petitioner is not entitled to relief.

CONCLUSION

Following our review, we conclude that the petitioner has not met his burden of proving that his attorneys were ineffective in their representation or that the petitioner’s guilty plea was unknowing or involuntary. Accordingly, we affirm the denial of the petition for post-conviction relief.

J.C. McLIN, JUDGE